Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1631

ALABAMA DRY DOCK AND SHIPBUILDING CO.,
Petitioner,

versus

FRANK KININESS, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	18
Proof of Service	19
Appendix	1a

CITATIONS

Cases:

Cleveland Terminal & Valley R. Co. vs. Cleveland S.S. Co., (1908) 208 U.S. 316 16

Earles vs. Union Barge Lines Corp., (3 Cir., 1973) 486 F.2d 1097 10

Executive Jet Aviation, Inc. vs. City of Cleveland, et al., (1972) 409 U.S. 493 9-10

The Genesee Chief, et al. vs. Fitzhugh, et al., (1851) 12 Howard 443 14,15

Gutierrez vs. Waterman S.S. Corp., (1963) 373 U.S. 206 16

Healy vs. Ratta, (1934) 292 U.S. 263 11

Jacksonville Shipyards vs. Perdue, 539 F.2d 533 (5 Cir., 1976) 5

Jacksonville Shipyards vs. Skipper, 539 F.2d 533 (5 Cir., 1976) 6,12

CITATIONS (Continued)

Page

Knickerbocker Ice Co. vs. Stewart, (1920) 253 U.S. 149 13

Martin vs. West, (1911) 222 U.S. 191 16

McCullum vs. United International Corp., (9 Cir., 1974) 493 F.2d 501 10

Nacirema Operating Co. vs. Johnson, (1969) 396 U.S. 212 12,13,14

Northeast Marine Terminal Company, Inc. vs. Caputo, (1977) ___ U.S. ___, 45 LW 4729 9

Ryan Stevedoring Co. vs. Pan Atlantic S.S. Corp., (1956) 350 U.S. 124 12

Seas Shipping Co. vs. Sieracki, (1946) 328 U.S. 85 11-12

State Industrial Commission vs. Nordenbolt Corp., (1922) 259 U.S. 263 16

The Troy, (1908) 208 U.S. 321 16

U.S. vs. Matson Navigation Co., (9 Cir., 1953) 201 F.2d 610 16

Victory Carriers vs. Law, (1971) 404 U.S. 202 10,11,13,16

Washington vs. W. C. Dawson & Co., (1924) 264 U.S. 219 13

Statutes:

Title 33 U.S.C.

§ 902(3) 3,5,7

§ 902(4) 7

§ 903(a) 3,5,6

CITATIONS (Continued)

Page

Title 46 U.S.C., § 740 15

Article I, § 8, Clause 18, U.S. Constitution ... 14,15,16

Article III, § 2, U.S. Constitution 14,15

Other Authorities:

3 U.S. Code, Congressional and Administrative News, 92nd Congress, 2nd Session 4708 8

Vol. 39, No. 101, Part III, Federal Register, U.S. Department of Labor, Employment Standards Administration, § 710.5(c) 7

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No.

ALABAMA DRY DOCK AND SHIPBUILDING CO.,
Petitioner,

versus

FRANK KININESS, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Alabama Dry Dock and Shipbuilding Co., prays that a writ of certiorari issue to the United States Court of Appeals for the Fifth Circuit, affirming a decision of the Benefits Review Board, U.S. Department of Labor, in Respondents' favor.

I.

OPINIONS BELOW

A. This is a Petition to the United States Court of Appeals for the Fifth Circuit and specifically to its opinion dated June 16, 1977. This opinion is reported at 554 F.2d 176, and is also set out in full in Appendix "A" hereto.

B. The opinion and decision of the Benefits Review Board, dated May 18, 1976, is unofficially reported at 4 BRBS 13, and is set out in full in Appendix "B" hereto.

C. The decision and order of the Administrative Law Judge, dated September 29, 1975, which was affirmed by the Benefits Review Board, is unreported and is set out in full in Appendix "C" hereto.

II.

JURISDICTION

A. The judgment of the Court of Appeals for the Fifth Circuit was made and entered on June 16, 1977, and is printed in Appendix "D" hereto.

B. Petitioner filed an application to stay the issuance of the mandate on July 1, 1977, and a stay of the mandate was granted to July 29, 1977. Application has been made to extend the stay of mandate until August 12, 1977.

C. The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1).

III.

QUESTIONS PRESENTED

The Respondent, Frank Kininess, an employee of the Petitioner, was injured while preparing to sandblast a disassembled gantry crane which was stored on a back lot of Petitioner's premises. Kininess was assigned the task of sandblasting the disassembled crane while it was in storage waiting to be

assembled in order to prevent rusting. It was sometime after Kininess' accident before the gantry crane was actually assembled and placed in operation.

The questions presented for review on this Petition are:

1. Under the facts were the Respondent Kininess' accident and resulting injury within the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act, as amended 1972, Title 33, U.S.C., § 901, et seq. (LHWCA)?

2. Are the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act constitutional?

IV.

STATUTES INVOLVED

The statute involved is 33 U.S.C., § 901, et seq., Longshoremen's and Harbor Workers' Compensation Act, as amended 1972, and particularly §§ 902(3) and 903(a).

V.

STATEMENT OF THE CASE

Jurisdiction of this case in the first instant, Office of Administrative Law Judges, U.S. Department of Labor, was under the Longshoremen's and Harbor Workers' Compensation Act, Title 33, U.S.C., § 919(d).[1]

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1 Review of the Administrative Law Judge decision and order was then had before the Benefits Review Board pursuant to 33 U.S.C., § 921(b), and that Board's decision was appealed to the United States Court of Appeals for the Fifth Circuit under the authority of 33 U.S.C., § 921(c).

In 1956, Kininess was employed by the Petitioner, (hereinafter sometimes referred to as "Addsco") as a painter, scaler and sandblaster. His primary work was to paint land-based structures such as buildings on the premises of Addsco; however, he did on rare occasion paint the insides of cabins and other compartments on vessels. His job classification with Addsco was a "brush painter". According to Kininess, his job required that on occasion he brush paint areas on ships where spray painting would not cover, and he also said he brush painted land-based buildings and other land-based structures. According to the evidence, Kininess, as a "brush painter" or "inside painter", spent approximately 25% of his working time for Addsco on board vessels and 75% of his working time painting office buildings and maintaining the painting of land-based welding bank foundations. Kininess spent 50% of his work time welding bank foundations.

At the time of his accident, on August 7, 1973, Respondent was working out of his job classification on a hopper which contained sand, or other blasting substance, used to sandblast a Goliath crane which was completely disassembled and being maintained by Addsco and which was ultimately assembled by an independent contractor on land some period of time after the Respondent's accident. The Goliath crane had been delivered to Addsco's yard in several sections by a vessel from Holland, and these sections were placed out on a back yard on Addsco's facility some distance from the water's edge of the Mobile River in an area of the yard not used for ship construction or repair work. The employees of Addsco, including Kininess were maintaining the unassembled sections of the crane by

sandblasting and spot painting them to prevent rusting. Kininess was not preparing the gantry for assembly nor was his work in preparation for assembly. The hopper where Kininess was located when he fell and sustained his injury was estimated to be between 200 and 2,000 feet from the water.

The gantry crane was ultimately constructed on fixed tracks and was subsequently used to pick up weldments, carry them to the water's edge, and set them on pontoons or barges. Without dispute, the gantry was not assembled at the time of the Respondent's accident, and it was not being used in any type of ship repair or construction. In fact, the gantry lay in many pieces on a vacant lot on the premises of Addsco at the time of the accident; the gantry was not under construction but was being maintained to prevent corrosion and rusting while it was waiting to be assembled by an independent contractor. The gantry had not become an integral part of Addsco's ship repair and construction operations.

The Administrative Law Judge found that Kininess' accident and injury were within the jurisdiction of the Longshoremen's and Harbor Workers' Act, as amended 1972 and his decision was affirmed by the Benefits Review Board by order dated May 18, 1976. The Board further held the 1972 Amendments to the Act were constitutional. The Court of Appeals, relying upon its own decision of *Jacksonville Shipyards vs. Perdue* (and four other consolidated cases), 539 F.2d 533 (5th Cir., 1976), (Judgment Vacated, U.S. Supreme Court, June 28, 1977, 45 LW 3835) concluded that Kininess was a covered employee under § 902(3) of the Act, on a maritime situs within § 903(a) of the Act, and that the

1972 Amendments to the Act were constitutional. The Court of Appeals further concluded that the resolution by the Benefits Review Board of the issues presented "is to be affirmed if a reasonable legal basis supports the Board's conclusions."

VI.

REASONS FOR GRANTING THE WRIT

The decision of the United States Court of Appeals for the Fifth Circuit herein conflicts in principle with the intent of Congress in extending jurisdiction under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., § 901, et seq. (hereinafter referred to as LHWCA), is in direct conflict with its own decision of *Jacksonville Shipyards vs. Skipper*, 539 F.2d 533 (5 Cir., 1976) (decided with *Perdue*), and in effect, extends jurisdiction under the LHWCA to all injuries to all employees injured while employed by a shipyard or ship repairman.

1. § 903(a) of LHWCA provides:

> "Compensation shall be payable under this Act in respect of disability or death of an employee but only if the disability or death results from the injury occurring upon the navigable waters of the United States including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel."

§ 902(3) of LHWCA provides:

> "The term 'employee' means only persons engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and a harbor worker including a ship repairman, ship builder, and ship breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by a master to load or unload or repair any small vessel under eighteen tons net."

§ 902(4) defines an "employer" as follows:

> "The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part upon the navigable waters of the United States including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel."

In the Proposed Guidelines issued by the Department of Labor on May 23, 1974, following enactment of the LHWCA, Vol. 39, Number 101, Part III, Federal Register, the Department of Labor, Employment Standards Administration, under § 710.5(c) it is stated:

> "Where the work or facility has no direct relationship to the actual construction, repair, or breaking of vessels, the coverage in this respect does not extend thereto."

Consequently, since it is clear the Respondent in this case was not engaged in work of repairing, constructing or breaking a vessel; was not engaged in "maritime employment"; and his accident did not occur upon navigable waters or an "adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel" it should follow that jurisdiction of his accident is not under the LHWCA, but lies under the jurisdiction of the Alabama State Compensation Act. A reading of the Act in light of the facts can lead to no other conclusion.

However, the Court of Appeals concluded that Kininess was an "employee" within the meaning of the LHWCA. The Court considered that the work of the Respondent in sandblasting the disassembled crane was "an essential aspect" of the shipbuilding business. Kininess was neither assembling nor preparing to assemble the crane; he was simply assisting in preventing it from rusting while it was lying in storage on Addsco's yard. Kininess was not directly involved in shipbuilding or ship repair.

It was not the intent of Congress to extend jurisdiction under the 1972 Amendments to the LHWCA to every accident occurring in a shipyard or anywhere and in any manner involving shipbuilding or repair operations. It is clearly stated in 3, U.S. Code, Congressional and Administrative News, 92nd Congress, 2nd Session 4708 (Extension of Coverage to Shoreside Areas) that:

> "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just

> because they are injured in an area adjoining navigable waters used for such activity. . . ."

The Department of Labor apparently was well aware of this Congressional intent when it prepared its Proposed Guidelines, supra, and stated:

> "Where the work or facility has no direct relationship to the actual construction, repair or breaking of vessels, the coverage in this respect does not extend thereto."

It is submitted that this position was approved by this Court in its recent decision of *Northeast Marine Terminal Company, Inc., et al. vs. Caputo,* et al. (1977), ___ U.S. ___, 45 LW 4729, a case concerned with the extent of jurisdiction to longshoremen and checkers under the Act, wherein the Court notes that "persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered."[2] 45 LW at 4734. Kininess was not engaged in the overall process of shipbuilding or ship construction at the time of his accident.

Clearly, the facts of this case do not meet the test of maritime jurisdiction as established by the United States Supreme Court and other Federal Appellate Courts. In the most recent U.S. Supreme Court case dealing with the question of jurisdiction, *Executive*

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2 *Northeast Marine Terminal Company, Inc., et al. vs. Caputo, et al.*, was primarily concerned with the extent of jurisdiction under the 1972 Amendments to the LHWCA as it applied to longshoremen, and particularly to acc dents involving workmen engaged in the handling of cargo as it moves between sea and land transportation after its immediate unloading. The case did not involve ship repairmen or shipyard workers who were not actually engaged in the construction or repair of a vessel at the time of their injury.

Jet Aviation, Inc. vs. City of Cleveland, et al., (1972) 409 U.S. 493, 34 L.Ed.2d 454, 93 S.Ct. 493, the Court declined to adopt "locality" as the exclusive test of admiralty tort jurisdiction and held there must be a significant relationship between the tort and traditional maritime activities. See also *Earles vs. Union Barge Line Corp.*, (3 Cir., 1973) 486 F.2d 1097; *McCullum vs. United International Corp.*, (9 Cir., 1974) 493 F.2d 501.

In *Victory Carriers vs. Law*, (1971) 404 U.S. 202, 30 L.Ed.2d 383, 92 S.Ct. 418, at 30 L.Ed.2d 391, this Court, in determining an issue of extending admiralty jurisdiction inland, stated:

> "We are not inclined at this juncture to disturb the existing precedents and to extend shoreward the reach of the maritime law further than Congress has approved. We are dealing here with the intersection of federal and state law. As the law now stands, state law has traditionally governed accidents like this one. To afford respondent a cause of action would thus intrude on an area that has heretofore been reserved for state law, would raise difficult questions concerning the extent to which state law would be displaced or preempted, and would furnish opportunity for circumventing state workmen's compensation statutes. In these circumstances, we should proceed with caution in construing constitutional and statutory provisions dealing with the jurisdiction of the federal courts. As the court declares in Healy vs. Ratta, 292 U.S. 263, 270, 78 L.Ed. 1248, 1254, 54 S.Ct. 700 (1934). 'The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. . . . *Due regard for the rightful independence of state governments, which should actuate federal courts requires that they scrupulously confine their own jurisdiction to the precise limits which* [a *federal*] *statute has defined.*'" (Emphasis supplied.)

Thus, this Court requires that a federal court scrupulously confine its jurisdiction to the precise limits defined by the federal statute, here the LHWCA, so as not to infringe on the rights of a state government.

The subject accident occurred in that area on the land which Mr. Justice White referred to in *Victory Carriers vs. Law, supra*, as coming within the state's jurisdiction. It is respectfully submitted that this is exactly what the Supreme Court had in mind in *Healy vs. Ratta*, (1934) 292 U.S. 263, at 270 (quoted with approval in *Victory Carriers vs. Law, supra*) when it admonished that federal courts should "scrupulously confine their own jurisdiction to the precise limits which [a federal] statute has defined."

The major purpose of amending the LHWCA was to increase benefits under said Act which had not been increased since 1961. Collaterally, Congress attempted to facilitate funding of increased benefits by abolishing the legion of litigation which had arisen under the decisions of *Seas Shipping Co. vs. Sieracki*,

(1946) 328 U.S. 85, and *Ryan Stevedoring Co. vs. Pan Atlantic S.S. Corp.*, (1956) 350 U.S. 124. The change bringing the LHWCA ashore was merely for purposes of correcting the unfairness announced in *Nacirema Operating Company vs. Johnson*, (1969) 396 U.S. 212, where a longshoreman's recovery under the Act depended upon the narrow question of whether he was injured on the vessel or a few feet away on the pier.

The 1972 Amendments to the LHWCA should extend only to those employees whose work has a direct relationship to the actual construction, repair, or breaking of vessels and not to every employee in the yard. It is respectfully submitted that Congress did not intend that accidents such as that in the case *sub judice* be covered by the 1972 Amendments. The court below has, by its opinion here for review, extended coverage under the LHWCA beyond the limits intended by Congress in enacting the 1972 Amendments.

2. The decision of the court below is in direct conflict with its own decision of *Jacksonville Shipyards vs. Skipper*, 539 F.2d 533 (5 Cir., 1976).

In *Skipper*, an employee who had been primarily engaged in ship repair work as a welder and burner was injured while assisting in tearing down a building which had formerly been used as a fabrication shop. The abandoned shop was located in an unused area across the river from the employer's main facility. The purpose of the dismantling was to obtain steel to be used in the manufacture of sandblasting equipment to be used in vessel construction. The court concluded Skipper was not a "ship repairman" under § 902(3) of the Act and stated:

> "We look only to his duties at the time of the injury, and these were decidedly not within the contemplation of the statute."

Recovery under the LHWCA was denied Skipper.

It is submitted that the facts of the instant case and the *Skipper* case are for practical purposes identical, and the denial of coverage to Skipper under the Act while granting it to Kininess here is in obvious direct conflict between the decisions of the court below.

3. The Appellate Court below erroneously concluded that the 1972 Amendments to the LHWCA are constitutional.

This Court has on two previous separate occasions rejected Congressional efforts to extend state workmen's compensation statutes to shipboard injuries sustained by maritime workers and longshoremen. *Knickerbocker Ice Co. vs. Stewart*, (1920) 253 U.S. 149, and *Washington vs. W. C. Dawson & Co.*, (1924) 264 U.S. 219; see also *Victory Carriers vs. Law*, supra, 404 U.S. at 207. In other words, the Court struck down as unconstitutional Congressional statutes which endeavored to extend state compensation benefits to land based employees injured on board a vessel. Following these decisions, Congress enacted the Longshoremen's and Harbor Workers' Act of 1972 providing compensation coverage to those employees. However, as pointed out in *Nacirema Operating Co. vs. Johnson*, supra, coverage under that Act did not extend ashore, and even piers and wharves were considered to be extensions of land, and the state

compensation acts were held to cover injuries occurring thereon. Consequently, the dividing jurisdictional line was drawn at the gangplank. This Court was firm in its position that Congress was without authority to extend the state compensation laws onto the navigable waters. The converse has resulted from the enactment of the 1972 Amendments to the LHWCA in that the federal compensation act has gone ashore by reason of the decision below — not just to the piers and wharves where Congress clearly intended it to go in order to correct what was thought by some to be the inequities of *Nacirema Operating Co. vs. Johnson*, supra, but into vacant, unused lots of the shipyards, shops, etc., all of which are far removed from the waters' edge and from maritime jurisdiction.

It is for this reason that Addsco contends the 1972 Amendments to the LHWCA are unconstitutional. Article I, § 8, Clause 18, U.S. Constitution, gives to Congress the power:

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Article III, § 2 extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction." The landmark decision of *The Genesee Chief, et al. vs. Fitzhugh, et al.*, (1851) 12 Howard 443, was the first to consider the constitutional jurisdiction of the federal courts in admiralty and maritime matters and was concerned with the constitutionality

of an Act of Congress which extended jurisdiction of the federal courts to certain cases upon the Great Lakes and the navigable waters connecting them. The Court upheld the constitutionality of the Act under Art. I, § 8, Clause 18 and Article III, § 2 of the Constitution. The Court does point out that if the validity of the Act there in question depended upon the power of Congress to regulate commerce, it would be unconstitutional because to be constitutional, the law "must be supported on the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States when the Constitution was adopted." [12 Howard at 453.] It is respectfully submitted that the extent to which the 1972 Amendments to the LHWCA take the admiralty and maritime jurisdiction was not only unknown, but was unthinkable at the time the Constitution was adopted. In the *Genesee Chief*, supra, the Court observes that "the judicial power in cases of admiralty and maritime jurisdiction has never been supposed to extend to contracts made on land and to be executed on land." [12 Howard at 452.]

In 1948 Congress passed the Admiralty Extension Act which extended admiralty and maritime jurisdiction to "all cases of damage or injury, to persons or property, caused by a vessel on navigable waters, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C., § 740, 62 Stat. 496. This statute was passed to correct the inequitable result of the courts refusing to permit recovery in admiralty where a vessel on navigable waters caused damage to persons ashore, or to bridges, docks or other shore based equipment usually through colli-

sion. Cf. *Cleveland Terminal & Valley R. Co. vs. Cleveland S.S. Co.*, (1908) 208 U.S. 316; *The Troy*, (1908) 208 U.S. 321; *Martin vs. West*, (1911) 222 U.S. 191. The Extension Act was held to be constitutional in *U.S. vs. Matson Navigation Co.*, (9 Cir., 1953) 201 F.2d 610. However, it is important to note that the Extension Act retained the requirement that the injury or damage be "caused by a vessel on navigable waters." Such a relationship is notably absent in the 1972 Amendments to the LHWCA. There is no requirement that a vessel be in any manner involved in the injury and "navigable waters" is not even a consideration for jurisdiction. In *Gutierrez vs. Waterman S.S. Corp.*, (1963) 373 U.S. 206, it was held that admiralty jurisdiction, by virtue of the Extension Act, extended to a longshoreman injured by a vessel on the dock for liability — not compensation — recovery. However, again the jurisdiction went onto the pier because a vessel on navigable waters had caused the injury. However, see *State Industrial Commission vs. Nordenholt Corp.*, (1922) 259 U.S. 263, and *Victory Carriers vs. Law*, supra.

The jurisdictional extension of the 1972 Amendments is not within the scope of admiralty and maritime jurisdiction as known in the United States when the Constitution was adopted. While it is undisputed that Congress has power under Article I, § 8, Clause 18 to make all laws "necessary and proper" for carrying into execution all powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof, this does not give Congress unharnessed authority to extend admiralty and maritime beyond the limits intended and understood by the framers of the Constitution. It is submitted that just as Congress is without power to extend state jurisdiction onto the navigable waters, it is equally powerless and without constitutional authority to extend maritime and admiralty jurisdiction inland as has been done in the 1972 Amendments to the LHWCA. It follows that the said 1972 Amendments are unconstitutional.

The court below erroneously concluded that the 1972 Amendments to the LHWCA were constitutional, and this Court should not permit such conclusion to stand.

4. The decision of the court below involves an important question of statutory construction and constitutionality of the 1972 Amendments to the LHWCA which affects the entire maritime industry, particularly ship builders and ship repair yards, with regard to injuries sustained by their employees. The questions here presented should be settled for the guidance of lower courts, the administrative bodies charged with implementing the LHWCA, and the parties whose rights are affected thereby.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted and that the decree of the Court of Appeals should be reversed.

Respectfully submitted,

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PROOF OF SERVICE

I, W. Boyd Reeves, one of the attorneys for the Petitioner herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of July, 1977, I served three copies of the foregoing petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit on the Respondents herein by mailing the same in duly addressed envelopes, with first class postage prepaid, to their following attorneys of record:

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W. BOYD REEVES

APPENDIX "A"

ALABAMA DRY DOCK AND SHIPBUILDING CO.,
Petitioner,

v.

Frank KININESS and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

No. 76-2505.

United States Court of Appeals, Fifth Circuit.

June 16, 1977.

Petition for Review of an Order of the Benefits Review Board (Alabama Case).

Before MORGAN and RONEY, Circuit Judges, and KING*, District Judge.

RONEY, Circuit Judge:

Alabama Dry Dock purchased a "Goliath" gantry crane from Holland and, before assembling it for use in shipbuilding, stored it on a back lot of the company's shipyard. Employee Frank Kininess, assigned the duty of sandblasting the disassembled crane to remove rust, fell from an elevated hopper and fractured his pelvis. He sought benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901 *et seq.*, and prevailed before both an administrative law judge and the Benefits

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* District Judge of the Southern District of Florida sitting by designation.

Review Board, U. S. Department of Labor. Alabama Dry Dock appeals. Because the Board correctly determined that Kininess, at the time of this injury, was engaged in maritime employment on a site within the jurisdiction of the Act, we affirm.

This appeal presents three issues, which the Court has recently addressed at length. *See Jacksonville Shipyards v. Ferdue*, 539 F.2d 533 (5th Cir. 1976), *petition for cert. filed*, No. 76-1166, 45 U.S.L.W. 3588 (Feb. 1, 1977). *See also Ingalls Shipbuilding Corp. v. Morgan*, 551 F.2d 61 (5th Cir. 1977). As applied here, the questions are whether Kininess was a covered maritime employee under § 902(3); on a maritime situs within § 903(a); and, if so, whether the Compensation Act is constitutional.

Consideration of those questions must take into account the policy that the Act is to be liberally construed to promote its compensatory purpose. *See Voris v. Eikel*, 346 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953). In the administrative scheme, fact-finding is done by the administrative law judge, and his findings are to be upheld if supported by substantial evidence. *Presley v. Tinsley Maintenance Service*, 529 F.2d 433, 436 (5th Cir. 1976). While the issues of statutory construction presented on this appeal do not fall within the presumption of coverage mandated by the Act, 33 U.S.C.A. § 920(a), *see Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 269 (1st Cir. 1976), *petition for cert. filed*, No. 76-571, 45 U.S.L.W. 3355 (Nov. 9, 1976); *Pittson Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 48 (2d Cir. 1976), *cert. granted sub nom., Northeast Terminal Marine, Inc. v. Caputo*, ___ U.S. ___, 97 S.Ct. 522, 50 L.Ed.2d 607

(1976), the resolution of those issues by the Benefits Review Board is to be affirmed if a reasonable legal basis supports the Board's conclusions. *See Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 478-479, 67 S.Ct. 801, 91 L.Ed. 1028 (1947). *Contra, Pittson, supra*, 544 F.2d at 48-50.

Perdue discussed the statutory definition of a covered "employee" § 902(3), and concluded a worker falls within that definition

> if at the time of his injury (a) he was performing the work of loading, unloading, repairing, building or breaking a vessel, or (b) although he was not actually carrying out these specified functions, he was "directly involved" in such work.

539 F.2d at 539-540 (footnote omitted). Alabama Dry Dock argues Kininess was not "directly involved" in shipbuilding because the crane which he was sandblasting had not yet been assembled.

Two considerations lead to a rejection of that argument. First, as the administrative law judge concluded, Kininess' sandblasting "was an essential aspect of the Employer's ship repair and shipbuilding enterprise." App. 17. Maintenance of the crane was necessary to enable it to perform its eventual function of hauling fabricated ship sections to the water's edge. Accordingly, the Board had a reasonable basis for finding Kininess was "directly involved" in shipbuilding. The case relied on by the company, *Jacksonville Shipyards v. Skipper*, 539 F.2d 533 (5th Cir. 1976) (decided with *Perdue*), is different. In

Skipper, the Court held a worker injured while salvaging steel from an abandoned shop was not a covered employee. The purpose of the worker's duties was to provide materials for a plant which would manufacture equipment, not ships. 539 F.2d at 542. Consequently he, unlike Kininess, was not directly furthering the shipbuilding goals of his employer.

Second, coverage under the Act should not depend on whether the crane was in actual operation when Kininess was injured. The "discontinuity in time" does not "alter the essential nature" of the work Kininess was doing. *Ayers Steamship Co. v. Bryant*, 539 F.2d 533, 544 (5th Cir. 1976) (decided with *Perdue*). Repair and maintenance of machines used in shipbuilding is an essential aspect of the business. *J. A. McCarthy, Inc. v. Bradshaw*, 547 F.2d 1161 (3d Cir. 1977) (Local Rule 12(6)) (forklift repairman covered); *Vinciquerra v. Transocean Gateway Corp.*, 1 B.R.B.S. 523 (1975) (mechanic covered). Of necessity machines are not in use while they are being serviced. While a distinction might be drawn between a crane being held in storage pending use and an active crane disassembled for repair, the policy of liberal construction indicates such fine lines are inappropriate when determining coverage under the Act.

Perdue also provides an explanation of the Act's limitation of coverage to employees injured on a maritime situs, § 902(3). The Court said:

> we will look past an area's formal nomenclature and examine the facts to see if the situs is one "customarily used by an employer in loading, unloading, repairing or

> building a vessel." The clear statutory scheme is to cover employees who are injured while performing certain types of work in an area which is customarily used for such work.

539 F.2d at 541. Alabama Dry Dock cites language in the statute which defines the situs as one "adjoining" navigable waters. The company argues that because the back lot in which the crane was stored did not abut the water, it is not a maritime situs. The record does not disclose the position of the lot, and the estimates in the briefs place it from 150 to 2,000 feet from the water's edge. In any event, the physical distance is not decisive here. The test is whether the situs is within a contiguous shipbuilding area which adjoins the water. Alabama Dry Dock's shipyard adjoins the water. The lot was part of the shipyard, and was not separated from the waters by facilities not used for shipbuilding. *See Perdue, supra*, 539 F.2d at 542. Furthermore, the lot itself was "customarily used" for the maintenance and repair work engaged in by Kininess. It was an area in which work directly related to shipbuilding was taking place. *Cf. Stewart v. Brown & Root, Inc.*, 5 B.R.B.S. 37 (ALJ) (Sept. 30, 1976) (worker in shipyard under construction not covered.)

Alabama Dry Dock's final contention is that the statute is unconstitutional if it extends beyond the traditional boundaries of admiralty jurisdiction, which ended at the gangplank. *Halter Marine Fabricators v. Nulty*, 539 F.2d 533 (5th Cir. 1976), *petition for cert. filed*, No. 76-880, 45 U.S.L.W. 3514 (Jan. 25, 1977), a companion case to *Perdue*, rejected a similar argument on the ground that "shipbuilding employees beside the navigable waters" were suf-

ficiently maritime to allow congressional regulation under admiralty jurisdiction. 539 F.2d at 546. *Accord Dravo Corp. v. Maxin*, 545 F.2d 374 (3d Cir. 1976), *petition for cert. filed*, No. 76-1093, 45 U.S.L.W. 3577 (Feb. 22, 1977). We see no reason to question that holding. Admiralty jurisdiction has, in the past, changed as "new conditions give rise to new conceptions of maritime concerns." *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 52, 55 S.Ct. 31, 41, 79 L.Ed. 176 (1934).

AFFIRMED.

APPENDIX "B"

DECISION
BRB No. 75-275

FRANK KININESS
Claimant-Respondent
versus

ALABAMA DRY DOCK AND
SHIPBUILDING COMPANY,
Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED STATES
DEPARTMENT OF LABOR
Party-in-Interest

Appeal from Decision and Order of Louis Scalzo, Administrative Law Judge, United States Department of Labor.

Richard F. Pate (Diamond, Lattof & Gardner), Mobile, Alabama, for the claimant.

W. Boyd Reeves (Armbrecht, Jackson & DeMouy), Mobile, Alabama, for the employer.

Ronald E. Meisberg (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.*

Washington, Chairperson:

This is an appeal by the employer from a Decision and Order (75-LHCA-316) of Administrative Law Judge Louis Scalzo pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter referred to as the Act).

Claimant sustained a fractured pelvis when he fell from a sandblasting machine on August 7, 1973. At the time of the injury, claimant was operating the sandblasting machine which was being used to remove rust from a disassembled gantry crane lying within the employer's premises. Such work was outside his normal job classification of a brush painter. As a brush painter, he spent most of his time painting

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* Julius Miller, Member, did not participate in the decision of this case.

vessels, welding banks, and building within employer's premises. Shortly after the accident, the crane was assembled and was utilized in employer's shipbuilding and repairing operations.

The administrative law judge held that claimant had a temporary total disability from August 7, 1973 to September 25, 1973, and a five percent permanent disability of the left leg within the coverage of the Act. The employer appeals, contending that claimant was not an employee within the meaning of the Act; that the situs of the injury was outside the coverage of the Act; and that the 1972 Amendments to the Act are unconstitutional.

The contentions of the employer are without merit. The Board has maintained that the extension of jurisdiction in the 1972 Amendments is constitutional. *Kelley v. Handcor, Inc.*, 1 BRBS 319, BRB Nos. 74-165 and 74-165A (Feb. 28, 1975); *Coppolino v. International Terminal Operating Company, Inc.*, 1 BRBS 205, BRB No. 74-136 (Dec. 2, 1974).

Section 2(3) of the Act, 33 U.S.C. §902(3), provides:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker . . . .

The crane on which claimant was working at the time of the injury was purchased to assist in employer's business of shipbuilding and repairing. Claimant was

involved in routine maintenance of the crane which, when assembled, was integrated into the shipbuilding operations of employer's business. Since claimant's actions furthered the shipbuilding and repairing business of employer, he was an "employee" within the meaning of Section 2(3) of the Act. *See Skipper v. Jacksonville Shipyards, Inc.*, 1 BRBS 533, BRB No. 74-213 (June 11, 1975); *Nulty v. Halter Marine Fabricators, Inc.*, 1 BRBS 437, BRB No. 74-179 (May 2, 1975).

The situs requirement of Section 3(a) of the Act, 33 U.S.C. §903(a), is met if the injury occurs ". . . upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." Employer's contention that the place of claimant's injury is not an adjoining area customarily used in repairing or building a vessel is incorrect.

The Board has previously held that it "will not narrowly construe the term 'adjoining area' to restrict the situs of an injury to an area immediately adjacent to navigable waters." *Kelley v. Handcor, Inc.*, *supra* at 324. *See also Perdue v. Jacksonville Shipyards, Inc.*, 1 BRBS 297, BRB No. 74-200 (Jan 31, 1975). Claimant's injury occurred within employer's shipbuilding and repairing premises and at a place adjoining the navigable waters of the Mobile River.

The claimant's attorney has requested approval of a fee for services successfully rendered in the appeal before this Board. Having submitted to the Board a

complete, itemized statement of the extent and character of the necessary legal services performed, in accordance with the applicable Rules and Regulations, 20 C.F.R. §§702.132 and 802.203, the claimant's attorney is awarded a fee of $714.50, to be paid directly to him by the employer in a lump sum. 33 U.S.C. §928.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

/s/ RUTH V. WASHINGTON
Ruth V. Washington,
Chairperson

I Concur: /s/ RALPH M. HARTMAN
Ralph M. Hartman, Member

Dated this 18th day
of May 1976

APPENDIX "C"

DECISION AND ORDER

Case No. 75-LHCA-316
OWCP No. 7-27250

In the Matter of

FRANK KININESS,
Claimant

versus

ALABAMA DRY DOCK AND SHIPBUILDING CO.
Self-Insured Employer

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Laurie M. Streeter, Associate Solicitor)
United States Department of Labor
Washington, D. C. 20210
For the Director, Office of Workers' Compensation Programs, United States Department of Labor, Party in Interest

Before: LOUIS SCALZO, Administrative Law Judge

Statement of the Case

This case involves a claim arising under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. §901 *et seq.*, (hereinafter referred to as "the Act"), and the Rules and Regulations implementing the Act, 20 C.F.R. Parts 701 and 702.

A hearing was held on April 25, 1975, in Mobile, Alabama. The Claimant and self-insured Employer were represented by counsel at the hearing. The interests of the Director, Office of Workers' Compensation Programs, were represented by the Office of the Solicitor, United States Department of Labor, by means of a post-hearing brief. All parties were afforded full opportunity to be heard, to adduce evidence, to call, examine and cross examine witnesses, to make oral argument, and to submit proposed findings of fact and conclusions of law. Thereafter, the parties submitted briefs which have been duly considered.

Upon the entire record in this case, I make the following Findings of Fact, Conclusions of Law and Order.

Findings of Fact

Counsel for the Claimant and Employer have stipulated and it is so found, that the Claimant is experiencing a five percent permanent partial disability of the left leg as a result of a fractured pelvis sustained on August 7, 1973, when the Claimant fell from a sandblasting machine on the premises of the Employer;[1] that timely notice was given to the Employer; that the claim was filed in a timely manner; that a notice of controversion was filed in a timely manner; that an employer-employee relationship existed at the time of the injury; that the injury arose out of and in the course of employment; that at the time of the injury the Claimant's average weekly wage was in the amount of $135.47; and that compensation in the amount of $1,020.00 has been paid to the Claimant under the provisions of the Alabama State Workmen's Compensation Act.

The Claimant seeks compensation and medical benefits provided by the provisions of the Act.[2] The Employer argues that the claim falls within the purview of the Alabama State Workmen's Compensation Act and not the Longshoremen's and Harbor Workers' Compensation Act. The Employer also contends that the 1972 Amendments to the Act are unconstitutional. In this regard it is asserted that the Congress did not have the power and authority needed to extend maritime and admiralty jurisdiction to shore based workers, and further that the 1972 Amendments to the Act are violative of the Employer's rights under the

1 See Tr. 7, 11-12; Letter dated August 6, 1975 addressed to the Administrative Law Judge by counsel representing the Claimant; Employer's Brief at page 2; and memorandum dated September 4, 1975, relative to a September 4, 1975 telephone conference between the Administrative Law Judge and counsel representing the Claimant and Employer.

2 The Claimant testified that he did not work for about a six week period after the accident, and that he returned to work on September 26, 1973. (Tr. 48).

Fourteenth Amendment to the United States Constitution. Counsel for the Claimant and the Office of the Solicitor of Labor argue that the claim falls within the provisions of the Act.

The record reflects that the Claimant began working for the Employer in 1955 as a sandblaster, sandblasting machine operator, painter and scaler. (Tr. 56). Except for periods when laid off, the Claimant has worked for the Employer ever since, and was employed by the Employer on the date of the hearing. Most of the Claimant's work has been performed aboard ships. (Tr. 57-58). In this regard the Employer's shipyard is located on the Mobile River (Tr. 71), at which location the Employer is engaged in the business of shipbuilding and ship repair. (Tr. 118).[3]

On the day of the accident, the Claimant was assigned work as a sandblast machine operator. (Tr. 23, 62-63).[4] However, the record disclosed that he had been previously assigned and classified as an inside painter or brush painter, and that he was working outside of the inside painter or brush painter classification. (Tr. 65-66).

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3 The Employer does not contend that the Alabama Dry Dock and Shipbuilding Company is not an "employer" within the meaning of Section 2(4) of the Act, 33 U.S.C. §902(4). (Employer's Brief at 19). Moreover, the Employer's status as an "employer" within the Act is clearly reflected in testimony and exhibits made a part of the record.

4 The record disclosed that the Claimant was assigned temporarily to the Painters, Sandblasters and Scalers Department. Painters from this department were classified as outside painters. The work performed by this department is almost entirely ship-related. (Tr. 90-91).

The sandblasting machine involved in the fall was then being utilized to sandblast elements of a large disassembled gantry crane. (Tr. 19, 21-23).[5] The crane in question was delivered to the Employer in sections by ship from Holland. These sections were placed on the Employer's shipyard grounds for storage purposes. (Tr. 91, 75-76). Maintenance work being performed on the crane involved spot sandblasting rusty areas and priming these areas with paint. (Tr. 76, 91).

The crane was intended for use in connection with key elements of the Employer's shipbuilding and ship repair work. It was designed to lift large "weldments" onto pontoons, vessels or barges located on the water. (Tr. 80, 93-94).[6] A representative of the Employer testified that the crane was assembled for use on tracks within the premises of the Employer's shipyard. (Tr. 35-36). It became operational in the shipyard shortly after August 7, 1973, the date on which the Claimant was injured. (Tr. 92-93). The crane continued in operation thereafter, and was being utilized as of the date of the hearing. (Tr. 24-25).

The Claimant testified that the sandblasting machine on which he was working was located about one hundred and fifty feet from the water's edge at Way

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5 Sandblasting machines being utilized in this work were also utilized for the purpose of sandblasting the hulks of ships and other similar ship-related work. (Tr. 63). Between April 2, 1973 and August 3, 1973, the date of injury, the Claimant worked almost exclusively on maintenance functions being performed on segments of the disassembled crane. (Employer's Exhibit 6). However, a representative of the Employer testified that during this period he could have been engaged in painting work aboard ships. (Tr. 105).

6 "Weldments" were defined as large segments of a ship or vessel. (Tr. 93).

5 of the shipyard. (Tr. 19-20). A representative of the Employer related that the machine on which he was working was located approximately two thousand feet from the water's edge. (Tr. 78). During the period of storage and assembly, segments of the crane were located over a wide area of the premises comprised as part of the Employer's shipyard.

As noted, the Claimant's primary classification was that of an inside painter or brush painter. It was brought out that those working in this classification also engage in a great deal of work activity which is ship-related in that they are utilized to paint the interior portions of ships which cannot be reached by spray painters. (Tr. 66-77). However, it also appeared that this classification was also used to paint land based buildings closely associated with operations within the shipyard (Tr. 89-90, 112-115), and equipment utilized in connection with such operations. (Tr. 25-26).

A significant segment of the testimony related to the exact nature of an inside painter's duties, specifically the percentage of time spent in connection with painting work aboard ship as compared with work involving the painting of the interior portions of shipyard buildings and equipment. In this regard the Claimant testified that during the year prior to the injury, he had worked on ships as a brush painter, a "multitude of times." (Tr. 45-46). A representative of the Employer estimated that one in the inside painter or brush painter classification would ordinarily spend twenty-five percent of his time aboard ship painting, and that the remaining seventy-five percent of the time would be

spent painting shipyard buildings, and equipment used in the shipyard. (Tr. 105-106).[7] This witness estimated that fifty percent of the Claimant's time would have related to the painting of buildings in the shipyard. (Tr. 110). It was clearly brought out that buildings painted were closely associated with shipyard operations.

Conclusions of Law

The Employer contends that if the 1972 Amendments to the Act are construed to extend jurisdiction to include the Claimant's work activity, such extension would be unconstitutional. The Benefits Review Board has rejected similar arguments in *Coppolino* v. *International Terminal Operating Co., Inc.*, BRB No. 74-136 (December 2, 1974), and *Kelley* v. *Handcor, Inc.*, BRB Nos. 74-165 and 74-165A (February 28, 1975), which are controlling here. In any event, although the constitutional question is properly asserted in this administrative proceeding, final jurisdiction to pass on the constitutionality of an act of Congress is a prerogative of the judicial branch of the Government if judicial review is sought. See *Knowles* v. *Hirsch*, 65 F. Supp. 690 (D. D.C. 1946); *DuBois Clubs* v. *Clark*, 389 U.S. 309, (1967); *Irey* v. *Hodgson*, 354 F. Supp. 20 (N.D. W. Va. 1972), *aff'd mem.*, 409 U.S. 1070, (1972); *Wallace* v. *Lynn*, 507 F. 2d 1186 (D.C. Cir. 1974).

The Employer also argues that non-maritime elements of the work being performed at the time of the Claimant's injury operate to preclude the Claimant

7 With regard to equipment, specific reference was made to extensive painting work performed on welding banks and frames, which are primarily used in connection with shipbuilding and ship repair. (Tr. 26-27, 106-109).

from being classed as an "employee" under Section 2(3) of the Act, 33 U.S.C. §902(3). It is also asserted that the injury occurred in an area not contemplated by the coverage provisions set out in Section 3(a) of the Act, 33 U.S.C. §903(a).

Prior to the 1972 Amendments to the Act, geographical "situs" alone was controlling with respect to coverage, and there was no reference to the type of work being performed. If an employee was injured or killed on the "navigable waters of the United States" he was covered if he was working for an employer who had any employees engaged in maritime employment. It did not matter whether the claimant himself was engaged in maritime employment, if the situs test was met. *Peter* v. *Arrien*, 325 F. Supp. 1361 (E.D. Pa.), *aff'd*, 463 F. 2d 252 (3rd Cir. 1972); *Calbeck* v. *Travelers Insurance Co.*, 370 U.S. 114 (1962); *Pennsylvania R.R. Co.* v. *O'Rourke*, 344 U.S. 334 (1950).

Extension of coverage landward was accomplished by three of the 1972 Amendments to the Act. Section 3(a) of the Act, 33 U.S.C. §903(a), now provides:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel) . . . .

The definition of "employer" was also expanded to cover the same specified adjoining shoreside facilities, and the definition of "employee" was restricted to embrace only persons engaged in maritime employment, 33 U.S.C. §902(3) and (4).

Accordingly, the net effect of these 1972 Amendments was to expand "situs" to include adjoining shoreside facilities, and to contract "status" to require that an employee be engaged in maritime employment in order to be covered by the Act.

The complete definition of "employee" in Section 2(3) provides:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel. . . .

It is clear that in order to establish entitlement to benefits under the Act, a claimant who sustains an employment related injury must first satisfy the jurisdictional requirements of Sections 2(3), 2(4) and 3(a) of the Act. *Batista* v. *Atlantic Container Lines, Ltd.*, BRB No. 75-103 (August 22, 1975); *Richardson* v. *Great Lakes Storage & Contracting Co.*, BRB Nos. 74-212 and 74-212A (June 26, 1975); *Mildenberger* v. *Cargill, Inc.*, BRB No. 74-224 (July 3, 1975); *Stockman* v. *Clark & Son of Boston, Inc.*, BRB No. 74-231 (July 30, 1975). Thus, a determination of whether a claimant is

entitled to compensation pursuant to the Act requires an interpretation of these three sections. *Kelley* v. *Handcor, Inc., supra.*

At the outset it must be observed that Section 2(3) clearly includes within the term "maritime employment," certain specified groups of employees, including ship repairmen and shipbuilders. *Herron* v. *Brady Hamilton Stevedore Company*, BRB No. 74-171 (January 23, 1975).

The point in question is discussed in *Benedict* on Admiralty. In referring to the statutory definition of the term "employee," the test includes the following:

> In order to leave no room for any doubt, longshoremen and persons performing longshoring operations are specifically included, and so are harbor workers, ship repairmen, shipbuilders, and shipbreakers so that in the case of such persons, it is quite unnecessary to engage in any abstract discussion of the meaning of the term "maritime employment." *Benedict* on Admiralty, Volume 1A, Section 16, page 2-3 (1973 ed.).

A determination of the status of the Claimant must be determined from an evaluation of his work activities as a whole, and if after such an evaluation it can be concluded that the Claimant is engaged in "maritime employment," then he would in any event, necessarily be considered as an "employee" for purposes of coverage under the Act. *Mildenberger* v. *Cargill, Inc., supra.*

In this case the record is clear that the Claimant's work activities as a whole were those of one engaged in shipbuilding and ship repair work. The Claimant's usual duties as an inside painter or brush painter involved the painting of ships and equipment associated with the building and repair of ships. On the day of the injury, the Claimant was working in a different work classification as a member of the Painters, Sandblasters and Scalers Department. However, it was brought out that the work performed by this department is almost entirely ship-related.

On the basis of these facts, it must be concluded that the Claimant was a "harbor worker" within the meaning of Section 2(3) of the Act, in that he was employed as a ship repairman and shipbuilder as these terms are used in Section 2(3) of the Act.

The Employer argues that the Claimant was not preparing to sandblast a vessel lying in navigable waters, or dry dock, or on land; and that he was not working on some piece of equipment, machinery or part which would eventually find its way to a vessel. (Employer's Brief at 20). In this regard, it is again noted that the word "employee" in Section 2(3) of the Act is defined as "any person engaged in maritime employment." The statute does not require that one actually be working on a specific phase of ship repair or shipbuilding. The Claimant cannot be excluded from coverage under Section 2(3) solely because he did not participate in the work described by the Employer. *Richardson* v. *Great Lakes Storage & Contracting Co., supra.*[8]

8 However, in this case it must be observed that the crane on which the Claimant was working when injured, was intended to be, and did indeed become, an important piece of equipment in the Employer's shipbuilding and ship repair business activity.

Extending this pattern of argument further, it must be observed that apart from the characterization of the Claimant's work as a harbor worker engaged in ship repair and shipbuilding, there is ample basis for drawing a conclusion that Claimant's service at the time of his injury, falls within the purview of Section 2(3) of the Act because of the inherent maritime nature of the work he was performing when injured. The crane in question was being readied for a vital role in the improvement of the Employer's business of ship repair and shipbuilding. In this regard the crane became operational shortly after the accident. Thus, the Claimant's work on the crane was clearly in furtherance of the Employer's special economic interests in this field of endeavor. Again, his principal duties at the time of the injury were an essential aspect of the Employer's ship repair and shipbuilding enterprise, and thus for this reason, his duties, however described, must be classed as "maritime employment" within the meaning of Section 2(3) of the Act. *Skipper* v. *Jacksonville Shipyards, Inc.*, BRB No. 74-213 (June 11, 1975); *Nulty* v. *Halter Marine Fabricators, Inc.*, BRB No. 74-179 (May 2, 1975)

With regard to the question of the Employer's status as an "employer" within the meaning of Section 2(4) of the Act, it is noted that the Employer did not make this an issue (Employer's Brief at 19); however, as previously observed, the record clearly reflects that the Employer's operations fall within the purview of Section 2(4) of the Act. Moreover, since the Claimant is an "employee" within the meaning of the Act, it necessarily follows that the Employer herein is an "employer" within the meaning of Section 2(4) of the Act. *Harris* v. *Maritime Terminals, Inc.*, BRB No. 74-

178 (February 3, 1975); *Mason* v. *Old Dominion Stevedoring Corporation*, BRB Nos. 74-182 and 74-182A (March 21, 1975); *Powell* v. *Cargill, Inc.*, BRB Nos. 74-206 and 74-206A (May 30, 1975); *Stockman* v. *Clark & Son of Boston, Inc., supra.*

Turning to the question of whether the Claimant meets the situs test, it must be noted initially that the Benefits Review Board has held that the phrase, "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel. . . ." in Section 3(a) of the Act, clearly indicates that the Congress intended to extend shoreward the reach of the maritime law so as to include shore-side injuries previously covered by state workmen's compensation laws. *Avvento* v. *Hellenic Lines*, BRB No. 74-153 (November 12, 1974). More importantly, we now have a series of cases which clearly constitute authority for the principle that the term "adjoining area" as used in Section 3(a) should not be given a narrow and limited construction so as to restrict the situs of an injury either to an area immediately adjacent to navigable waters or to an area located within a certain distance of the water's edge. *Adkins* v. *I.T.O. Corporation of Baltimore*, BRB No. 74-123 (November 29, 1974); *Herron* v. *Brady-Hamilton Stevedore Company, supra; Perdue* v. *Jacksonville Shipyards, Inc.*, BRB No. 74-200 (January 31, 1975); *Kelley* v. *Handcor, Inc., supra; O'Leary* v. *Southeast Stevedore Co.*, BRB Nos. 74-228 and 74-228A (May 30, 1975).

Further guidance in construing Section 3(a) is now provided by a series of cases holding that the 1972 Amendments were intended to avoid the inequities of coverage precipitated by an employee walking into and out of the scope of the Act during the work day. *Herron* v. *Brady Hamilton Stevedore Company, supra; Perdue* v. *Jacksonville Shipyards, Inc., supra; O'Leary* v. *Southeast Stevedore Co., supra; Johns* v. *Sea-Land Service, Inc.*, BRB No. 75-124 and 75-124A (July 11, 1975).

In this case the injury occurred on the premises of the Employer's shipyard in an area being utilized for the storage and maintenance of the gantry crane. Considering the language used in Section 3(a), and also authorities interpreting this section, it must be concluded that the Claimant meets the situs requirements of the Act.

Since the Claimant meets all the jurisdictional requirements under the Act, he is entitled to benefits provided by the Act.

The record reflects that the Claimant was temporarily totally disabled during the period August 7, 1973 through September 25, 1973, and that thereafter he returned to work for the Employer with a five percent permanent partial disability of the left leg. Accordingly, it is determined that the Claimant is entitled to temporary total disability compensation in accordance with the provisions of Section 8(b) of the Act, 33 U.S.C. §908(b), during the period August 7, 1973 through September 25, 1973 inclusive. He is also entitled to five percent of the scheduled award provided for the loss of

one leg under the provisions of Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2), and to medical benefits provided by Section 7 of the Act, 33 U.S.C. §907.

Counsel for the Claimant has filed an application for an attorney's fee in the amount of $1,296.25 for a total of 28.25 hours of professional service performed during the period intervening between July 19, 1974 and September 4, 1975.[9] The total is comprised of 23.25 hours calculated at the rate of $45.00 per hour, and the balance, designated as trial work, at the rate of $50.00 per hour.[10]

Section 702.132 of the Regulations relating to the Act, 20 C.F.R. §702.132 provides that, "any" fee approved shall be reasonably commensurate with the actual necessary work performed, and shall take into account the capacity in which the representative has appeared, the amount of benefits involved, and the financial circumstances of the Claimant." Taking the entire record of this case into consideration, together with Section 702.132 of the Regulations and pertinent provisions of Section 28 of the Act, 33 U.S.C. §928, it is concluded that the attorney's fee claimed would be reasonable in this case.

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9 Letters dated August 8, 1975 and September 4, 1975 addressed to the Administrative Law Judge by counsel representing the Claimant.

10 By letter dated September 5, 1975, addressed to the Administrative Law Judge, counsel for the Employer contended that counsel for the Claimant was not entitled to a fee for reasons set out in the Employer's brief. He also argued that the amount claimed was excessive. These views are rejected for reasons set out in this opinion.

ORDER

IT IS THEREFORE ORDERED:

1. The Employer shall pay to the Claimant, Frank Kininess, compensation for temporary total disability pursuant to Section 8(b) of the Act, 33 U.S.C. §908(b), at the rate of $90.31 per week from August 7, 1973 through September 25, 1973, inclusive.

2. The Employer shall pay to the Claimant, compensation for a five percent permanent partial disability of the left leg pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2) at the rate of $90.31 per week commencing on September 26, 1973, and continuing thereafter for a period of 14.4 weeks.

3. Interest at the rate of six percent per annum shall be paid on all sums found herein as accrued compensation payments, and such interest shall be paid from the date each installment of compensation or portion thereof was due until finally paid.

4. The amount of compensation due and payable as a result of this order shall be paid in a lump sum; provided however, that compensation payments previously paid to the Claimant under the Act shall be offset and deducted from such lump sum.

5. The Employer shall pay for, or reimburse the Claimant for the reasonable cost of such necessary medical or surgical care and treatment as he may require, or may have required because of the injury sustained on August 7, 1973.

6. The Employer shall pay directly to J. Cecil Gardner, Esquire, the lump sum of $1,296.25 for legal services rendered to the Claimant.

/s/ LOUIS SCALZO
LOUIS SCALZO
Administrative Law Judge

Dated: September 29, 1975
Washington, D. C.

APPENDIX "D"

JUDGMENT

United States Court of Appeals
For the Fifth Circuit

October Term, 1976

No. 76-2505

BRB No. 75-275

ALABAMA DRY DOCK AND SHIPBUILDING CO.,
Petitioner,

versus

FRANK KININESS and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

Petition for Review of an Order of the Benefits Review Board (Alabama Case)

Before MORGAN and RONEY, Circuit Judges, and KING*, District Judge.

This cause came on to be heard on the petition of Alabama Dry Dock and Shipbuilding Co. for review of an order of the Benefits Review Board, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Benefits Review Board in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioner pay to respondents, the costs on appeal to be taxed by the Clerk of this Court.

June 16, 1977

Issued as Mandate:

* District Judge of the Southern District of Florida, sitting by designation.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Supreme Court, U. S.
FILED
SEP 1 1977
MICHAEL RODAK, JR., CLERK

No. 77-163

ALABAMA DRY DOCK AND SHIPBUILDING CO.,
Petitioner,

versus

FRANK KININESS, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, FRANK KININESS, IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

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OPINIONS BELOW

The opinions below are cited in the Petition and are set forth in full in Appendices "A", "B", and "C" of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the accident and resulting injury sustained by the Respondent, Frank Kininess (Claimant) are within the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act, as amended 1972, Title 33, U.S.C., Sec. 901, *et seq.* (the Act).

2. Whether the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act are constitutional.

STATUTE INVOLVED

The pertinent statute involved is 33 U.S.C., Sec. 901, *et seq.*, as amended 1972, Longshoremen's and Harbor Workers' Compensation Act.

STATEMENT

The facts surrounding the Claimant's accident and resulting injury were not in serious dispute at the formal hearing before the Administrative Law Judge. This litigation concerns the accident and resulting injury sustained by the Respondent, Frank Kininess, while employed by the Petitioner as a painter, scaler and sand blaster. The accident occurred within the confines of the Petitioner's shipyard and at a situs that was a contiguous shipbuilding area which adjoins navigable waters.

Based upon the facts as presented, the Administrative Law Judge found that the accident and in-

jury were within the jurisdiction of the Act, as amended, and his Decision and Order was subsequently affirmed by the Benefits Review Board by Order dated May 18, 1976. The Court of Appeals concluded that Mr. Kininess was entitled to coverage under the Act. The Court of Appeals found that Mr. Kininess was a covered employee as defined in Section 902(3) of the Act; that he was injured at a situs which met the requirements of Section 903(a) of the Act; and that Mr. Kininess was "directly involved" in the Petitioner's shipbuilding and ship repair endeavors. It further determined that the 1972 Amendments to the Act were constitutional.

ARGUMENT

I.

The Decision Below Is Clearly Correct

It is the position of this Respondent that the questions presented by the Petitioner have been fully answered by this Court in its recent Decision of *Northeast Marine Terminal Company, Inc. v. Caputo*, ___ U.S. ___, 45 LW 4729 (June 17, 1977). In that decision, the Court held that the two injured employees satisfied what has come to be called the "status" and "situs" tests. Both were injured ashore in areas adjoining navigable waters, while performing longshoring operations. This Court decided that Mr. Caputo and Mr. Blundo were entitled to the extended coverage of the Act.

Clearly, Mr. Kininess' accident occurred within the confines of the employer's shipbuilding and ship repair premises. The lot in which the crane was

stored was a part of the Petitioner's shipyard and it was not separated from navigable waters by facilities not used for shipbuilding or ship repair. The Court of Appeals correctly affirmed the Administrative Law Judge's finding that the injury occurred in an "adjoining area" within the meaning of Section 903(a).

The Court of Appeals correctly rejected the Petitioner's argument that Mr. Kininess did not satisfy the "status" test as set forth by the Act. This Court in *Northeast Marine Terminal Company, Inc. v. Caputo,* supra, indicated that "the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the Amendments, would be covered only for part of their activity". At a minimum, the evidence presented indicated that Mr. Kininess spent approximately 25% of his working time for the Petitioner aboard vessels. Certainly, he is the type of employee that Congress intended to cover by the 1972 Amendments to the Act.

Respondent submits that the Court's decision in *Caputo,* supra, of necessity resolves the Petitioner's argument that the 1972 Amendments, are unconstitutional by the very fact that the injured longshoremen in that decision were afforded the extended coverage of the Act as amended despite the occurrence of this injury ashore.

II.

There Is No Conflict Of Decision

Petitioner asserts that the decision in the instant case is contrary to the Fifth Circuit's own decision of

Jacksonville Shipyards v. Skipper, 539 F.2d 533 (5th Cir. 1976). The Court of Appeals properly denied coverage because Mr. Skipper failed to meet the "status" and "situs" tests of the Act. This Respondent submits that the present case is easily distinguished from *Skipper.*

At the time of his injury, Mr. Skipper was assigned work in a disused marine facility. No shipbuilding or ship repair operations were in progress there at the time of his injury. The area in which he was working was across the river from his employer's shipyard. In contrast, Mr. Kininess was injured in a lot in which the crane was being stored. It was a part of the Petitioner's shipyard. The lot was separated from navigable waters only by the shipbuilding and ship repair facilities of the Petitioner.

Mr. Skipper was injured while tearing down a building. The purpose of dismantling this structure was to salvage steel for use in constructing a plant which would manufacture sandblasting equipment. The plant was a new business venture of Jacksonville Shipyards, Inc. and it had no direct connection with the shipbuilding and ship repair work of Jacksonville Shipyards, Inc. The purpose of Mr. Skipper's duties was to provide materials for a plant which would manufacture equipment, not ships. The Court of Appeals correctly distinguished the two cases at page 3825, slip opinion (Appendix pages 3a-4a). In Mr. Kininess' case, he was maintaining a crane whose use in the future would be limited solely to aiding the Petitioner's shipbuilding and ship repair endeavors. The purpose of Mr. Kininess' duty was to further the

Petitioner's shipbuilding and ship repair interest by maintaining this crane pending use.

The Court of Appeals properly considered *Skipper* when addressing itself to the instant decision. Hence the Petitioner's argument is without merit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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GARDNER
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Mobile, Alabama 36601
Counsel for Respondent,
Frank Kininess

CERTIFICATE OF SERVICE

This is to certify that copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served on all counsel of record, postage prepaid, this 31st day of August, 1977

J. Cecil Gardner

Supreme Court, U. S.
FILED
SEP 27 1977
MICHAEL RODAK, JR., CLERK

No. 77-163

In the Supreme Court of the United States

OCTOBER TERM, 1977

ALABAMA DRY DOCK AND SHIPBUILDING COMPANY, PETITIONER

v.

FRANK KININESS and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

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FRANK KININESS and DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

Petitioner employed respondent Kininess at its shipyard adjoining the navigable water in Mobile, Alabama. Kininess has worked as a brush painter, scaler, and sandblaster since 1955. In 1969 or 1970 he became a "brush painter" or "inside painter," spending approximately 25 percent of his time on board vessels being built or repaired by petitioner; he spent the remainder of his time painting and otherwise maintaining the buildings, structures and equipment petitioner used in its shipbuilding and ship repairing enterprise (Pet. App. 14a-17a).

On August 7, 1973, Kininess was helping to sandblast an unassembled shipbuilding crane in order to prevent its deterioration prior to its assembly. Kininess fell from a ladder while checking the level of sand in the hopper feeding the sandblast machine. The hopper was located within petitioner's shipyard, but estimates of the distance from the hopper to the water's edge varied (Pet. App. 15a-16a).

The administrative law judge found that Kininess' work activities as a whole related to ship repair or shipbuilding, and therefore that he was a "harbor worker" covered by Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 86 Stat. 1251, 33 U.S.C. (Supp. V) 902(3). The administrative law judge also held that Kininess satisfied the "situs" requirement of Section 3(a) of the Act, 33 U.S.C. (Supp. V) 903(a), because he was injured in petitioner's shipyard, which adjoined the water and was customarily used in the building and repair of ships (Pet. App. 21a-24a). The Benefits Review Board affirmed (Pet. App. 6a-10a), and the court of appeals enforced the Board's order (554 F. 2d 176; Pet. App. 1a-6a).

Petitioner contends that Kininess was not engaged in maritime employment (within the meaning of Section 2(3) of the Act) and was not injured at a maritime situs (within the meaning of Section 3(a)). These contentions are foreclosed by *Northeast Marine Terminal Co.* v. *Caputo*, No. 76-444, decided June 17, 1977. "The Act focuses primarily on occupations" (slip op. 22), and Kininess was engaged in a maritime occupation when he was injured. Kininess spent all of his time working on the waterfront contributing to the construction and repair of ships. He spent approximately 25 percent of his time

working aboard ships, and therefore indisputably was covered by the Act for at least part of his employment. Because the Act is designed to achieve uniformity of coverage, he is covered for all of this employment. The Act expresses "the obvious desire to cover [harbor workers] whether or not their particular task at the moment of injury is clearly" ship repair or another statutorily-enumerated task (slip op. 25).

Kininess satisfied the Act's "situs" requirement because he was injured while working within a shipyard adjoining the waterfront and devoted to maritime tasks; there is no need that each portion of the facility abut the water. "[W]hen Congress sought to expand the situs to avoid anomalies inherent in a system that drew lines at the water's edge, it intended to include an area such as the one at issue here" (slip op. 30). See also *Dravo Corp.* v. *Maxin*, 545 F. 2d 374 (C.A. 3), certiorari denied, June 27, 1977 (No. 76-1093).[1]

Petitioner finally contends that the Act is unconstitutional to the extent that it applies to injuries on land. This argument has been rejected by every court that has considered the question. See *Pittston Stevedoring Corp.* v. *Dellaventura*, 544 F. 2d 35, 56-57 (C.A. 2), affirmed *sub nom. Northeast Marine Terminal Co.* v. *Caputo*,

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[1]Petitioner contends (Pet. 12-13) that the court of appeals' decision on the "situs" issue here conflicts with that of another panel of the same court in *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533, 542-543 (C.A. 5) (*Skipper's case*). We doubt that *Skipper's case* survived *Caputo*; this Court vacated and remanded another portion of the Fifth Circuit's decision that had rested on the same narrow view of the maritime situs. See *Director* v. *Jacksonville Shipyards, Inc.*, No. 76-1166, vacated and remanded June 27, 1977. But however that may be, any conflict between decisions of different panels of the same court of appeals is for that court to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902.

supra; Dravo Corp. v. *Maxin, supra*, 545 F. 2d at 377-379 and n. 4; *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533, 544-546 (C.A. 5), certiorari denied (on this issue) *sub nom. Halter Marine Fabricators, Inc.* v. *Nulty*, June 27, 1977 (No. 76-880). For the reasons stated in our memorandum in opposition in *Nulty*, a copy of which we have furnished to petitioner, the constitutional challenge to the statute is insubstantial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

CARIN ANN CLAUSS,
Solicitor of Labor,

LAURIE M. STREETER,
Associate Solicitor,

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SEPTEMBER 1977.

DOJ-1977-09